

November 4, 1999

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE WILLIAM ALLEN CLIFTON,
also known as Willie Clifton, and
BILLIE JEAN CLIFTON,

Debtor.

BAP No. EO-99-047

LOYD MAYBERRY, doing business
as Tahlequah Truss Company,

Appellant,

Bankr. No. 99-70702
Chapter 13

v.

WILLIAM ALLEN CLIFTON;
BILLIE JEAN CLIFTON; OFFICE
OF THE U.S. TRUSTEE; NORWEST
FINANCIAL; WILLIAM MARK
BONNEY, Trustee; INTERNAL
REVENUE SERVICE; and
OKLAHOMA TAX COMMISSION,

Appellees.

ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the Eastern District of Oklahoma

Before PUSATERI, BOULDEN, and MATHESON, Bankruptcy Judges.

PUSATERI, Bankruptcy Judge.

After examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. Bankr. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

case is therefore ordered submitted without oral argument.

Creditor Loyd Mayberry¹ appeals the bankruptcy court's order confirming the debtors' third amended chapter 13 plan. For the reasons set forth below, we affirm.

I. Background

In 1997, the debtors filed a chapter 7 bankruptcy case, and Mr. Mayberry filed a complaint seeking to have their debt to him excepted from discharge pursuant to 11 U.S.C. § 523(a)(2). The parties reached an agreement giving him a nondischargeable judgment for \$11,400, and establishing a monthly payment schedule for the debtors to follow. Mr. Mayberry agreed not to execute on the judgment so long as the debtors made the monthly payments. This agreement was approved by the bankruptcy court on July 9, 1998.

The debtors apparently made some of the payments, because when they filed a chapter 13 petition in March 1999, they listed their debt to Mr. Mayberry as \$10,000. In their third amended plan, the debtors proposed to pay priority claims of \$1,500 to their attorney, \$19,820.84 to the IRS, and \$1,122.50 to the Oklahoma Tax Commission. They also proposed to pay \$2,696 on a claim secured by a vehicle. They estimated they would also pay about 9% on \$36,945.25 worth of general unsecured claims. The plan was to run for sixty months, and would be funded out of Mr. Clifton's wages, salary, and commissions from his work as a "sub-contractor - Barn Builder." Mr. Mayberry filed an objection, stating three grounds for denying confirmation:

1. The Plan fails to follow the provisions of Title 11 U.S.C. section 1325(a);

¹ The record includes two spellings of Mr. Mayberry's first name, "Loyd" and "Lloyd." His attorney used the first spelling before the bankruptcy court and his initial pleadings before this Court, but has used the second in the brief he filed. One document contains Mr. Mayberry's signature over the typed name "Loyd Mayberry," and he appears to have signed "Loyd" as his first name. Consequently, we have used that spelling in this opinion.

2. The Plan fails to provide for all the disposable income to be submitted to the Trustee pursuant to 11 U.S.C. 1325(b)(1)(B); [and]
3. That [sic] Plan fails to comply with 11 U.S.C. 1325(a)(4).

Appellant's appendix at 52. The objection explained the third ground by pointing out that the debt to Mr. Mayberry had been excepted from discharge in the previous chapter 7 case, and asserting that Mr. Mayberry "should not now be paid less under Debtor's [sic] chapter 13 plan." *Id.*

According to the bankruptcy court's order confirming the debtors' plan, a confirmation hearing was held on June 3, 1999, at which Mr. Mayberry's objection "was denied." No transcript of this hearing has been included in the record on appeal. The written order was filed on June 8, and contains no explanation of the court's reasons for denying the objection.

II. Discussion

Mr. Mayberry raises two issues in his appeal. The threshold issue is whether the debtors proposed their plan in good faith as required by § 1325(a)(3). The record does not show that Mr. Mayberry specifically raised this issue below, only that he objected generally that none of the requirements of § 1325(a), a provision with six subsections, had been met. We note that he did not include the issue himself when describing in his brief the objection he presented to the bankruptcy court. Appellant's brief at 2. He declares, "The issue of good faith was clearly before the Bankruptcy court," Appellant's brief at 4, without identifying any part of the record that supports this assertion.

The argument Mr. Mayberry now pursues on the good faith issue is hardly more clear than whether he explicitly informed the bankruptcy court that he was contesting the debtors' good faith. He may be suggesting that the bankruptcy court's finding that the debtors filed their plan in good faith was clearly erroneous. However, the "good faith" inquiry under § 1325(a)(3) requires consideration of all the circumstances surrounding the debtors' bankruptcy case.

See, e.g., Flygare v. Boulden, 709 F.2d 1344, 1347-48 (10th Cir. 1983). The absence of a transcript prevents us from knowing all the circumstances that might have been revealed to the bankruptcy court at the confirmation hearing, so we cannot determine whether its good faith finding was clearly erroneous. Even if we had a complete record, we agree with the Ninth Circuit Bankruptcy Appellate Panel that “good faith” under § 1325(a)(3) ordinarily depends so heavily on factual determinations that we will not consider it on appeal where it was not explicitly raised before the bankruptcy court. *United Cal. Sav. Bank v. Martin (In re Martin)*, 156 B.R. 47, 49-50 (9th Cir. BAP 1993).

Mr. Mayberry may instead be suggesting that the Tenth Circuit’s decision in *Pioneer Bank v. Rasmussen (In re Rasmussen)*, 888 F.2d 703 (1989) (*per curiam*), establishes a *per se* rule that debtors who have a debt determined in a chapter 7 case to be nondischargeable can never in good faith file a subsequent chapter 13 plan in which they attempt to discharge that debt for *de minimis* payments. We do not believe that *Rasmussen* declares such a broad rule, but have considered whether the facts that are disclosed in the record on appeal sufficiently mirror those in *Rasmussen* that the bankruptcy court was required to conclude that the debtors’ plan was not proposed in good faith. We find this case to be distinguishable from *Rasmussen* in many significant respects: (1) the debtors did not file their chapter 13 case until about eight months after the agreement that part of Mr. Mayberry’s claim was nondischargeable was approved in their chapter 7 case; (2) besides the debt to Mr. Mayberry, the debtors are dealing with almost \$21,000 in priority debts to the IRS and Oklahoma Tax Commission, and almost \$27,000 in other general unsecured debts; (3) the debtors’ plan runs for five years, not three; (4) the record on appeal does not indicate whether the debtors qualified to file a chapter 13 case when they filed their chapter 7 case; and (5) the debtors’ plan will pay more than 1.5% of Mr.

Mayberry's claim—about 9% according to the debtors, or about 5% according to Mr. Mayberry's attorney. Even without a transcript that would enable us to review all the facts that were revealed to the bankruptcy court, we believe these differences were sufficient to permit the bankruptcy court to conclude that *Rasmussen* did not mandate a finding of bad faith in this case, and instead decide under the totality of the circumstances that the debtors had proposed their plan in good faith. As indicated above, Mr. Mayberry's failure to explicitly raise the issue before the bankruptcy court precludes any further appellate review of the debtors' good faith.

As a second issue, Mr. Mayberry contends the debtors' plan violates 11 U.S.C. § 1325(a)(4) because it will pay him only 5% of his claim, substantially less than he would receive if the debtors' bankruptcy estate were liquidated under chapter 7. This is true, he argues, because the debtors make substantial income from which he could reasonably expect to collect the nondischargeable judgment he obtained in the previous chapter 7 case. A careful review of the language of § 1325(a)(4) reveals that this argument is wrong. The provision allows a chapter 13 plan to be confirmed only if:

the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date.

Essentially, this language requires the present value of property (ordinarily money), calculated on the effective date of the plan, that will be distributed to an unsecured creditor over time under a chapter 13 plan to be equal to or greater than the amount that would be paid on the creditor's claim if a chapter 7 liquidation of all the debtors' non-exempt assets were accomplished on that same date. Earnings from services an individual debtor performs in the future are not included in a chapter 7 bankruptcy estate. *See* 11 U.S.C. § 541(a)(6). In fact, Mr. Mayberry would not be "paid" by the chapter 7 bankruptcy estate—in any

normal sense of that word—with the right to try to collect from the debtors in the future. Instead, under chapter 7, he would simply retain the right to collect he had before the debtors filed for bankruptcy, and the nondischargeability of the debt would allow him to continue to try to enforce that right. Congress has not made debts like the one the debtors owe Mr. Mayberry nondischargeable in chapter 13. Other courts facing Mr. Mayberry's argument that § 1325(a)(4) is not satisfied by less than full payment to a creditor who would eventually be paid in full on a debt that would not be discharged in chapter 7 have rejected it. *See, e.g., Education Assistance Corp. v. Zellner*, 827 F.2d 1222, 1224-26 (8th Cir. 1987); *Phoenix Inst. of Tech. v. Klein (In re Klein)*, 57 B.R. 818, 820 (9th Cir. BAP 1985); *In re Kazzaz*, 62 B.R. 308, 310 (Bankr. E.D. Va. 1986); *see also* 2 Keith M. Lundin, *Chapter 13 Bankruptcy* § 5.31 (2d ed. 1994) (citing these and other cases, some involving similar argument that full payment would result from a guaranty).

III. Conclusion

For the reasons explained above, the bankruptcy court's order confirming the debtors' chapter 13 plan is AFFIRMED.